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In the Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS D. MCAUSLAND AND CHRISTOPHER M. PAFORT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' acquisition of confidential government information generated in connection with competitively bid defense procurements constituted theft of government property, in violation of 18 U.S.C. 641, and the fraudulent obtaining of government property by the use of interstate wire communications, in violation of 18 U.S.C. 1343.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 979 F.2d 970.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1992. A petition for rehearing was denied on October 1, 1992. Pet. App. 16a. The petition for a writ of certiorari was filed on December 4, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted on one count of conversion of government property, in violation of 18 U.S.C. 641; four counts of wire fraud, in violation of 18 U.S.C. 1343; and one count of conspiring to commit the above offenses and to defraud the United States, in violation of 18 U.S.C. 371. They were each sentenced to 12 months' imprisonment. The court of appeals affirmed. Pet. App. 1a-15a.

1. Between March 1987 and June 1988 petitioners conspired with Thomas Muldoon to obtain sensitive government procurement information from the Department of Defense concerning three contracts on which petitioners' employer, Litton Data Systems, had made or was considering making bids. Petitioner McAusland was vice-president of marketing or business development, and petitioner Pafort was a director of business development for Litton. Muldoon was an independent consultant hired by petitioners. Petitioners used Muldoon to obtain from Navy employees documents and information on Navy procurements that the employees were not authorized to disclose to petitioners or others outside the government. Pet. App. 3a-9a.

The procurement process takes place within the framework of the Federal Acquisition Regulations (FARs). A procurement begins when an agency formulates a program to meet national defense needs and then issues a request for proposals. After the proposals are submitted, the agency performs an initial evaluation, separately analyzing the cost and

technical components of the proposals. The contracting officer or advisory team then combines the two components and evaluates them to determine the "competitive range" for the procurement. The range consists of proposals that "have a reasonable chance of being selected for award." 48 C.F.R. 15.609(a) (1987). Proposals falling outside that range are not further considered. After the initial evaluation, the agency can enter into formal discussions with the remaining competitors and may invite the competitors to submit their "best and final offers" (BAFOs). The source selection authority then decides to whom to award the contract based on the recommendations of the contracting officer or advisory team. Pet. App. 3a-4a.

Muldoon provided petitioners with information on three procurements: (1) the Advanced Tactical Air Command Central (ATACC), a procurement for a radar command and control system by the Space and Naval Warfare Systems Command (SPAWAR); (2) UYQ-21, a procurement for a radar display system conducted by Naval Sea Systems Command (NAVSEA); and (3) Fiber Optics Cable System (FOCS), a procurement by SPAWAR for a Marine Corps fiber optic communications system. Pet. App. 4a.

a. *ATACC procurement.* In April 1987, SPAWAR issued a request for proposals (RFP) for the ATACC procurement. The RFP stated that proposals would be evaluated in four areas, but it did not give the

weights the government evaluators assigned to each area.[1] Pet. App. 5a.

Pafort asked Muldoon to obtain information about the ATACC procurement, and Muldoon eventually succeeded in obtaining the evaluation weights the government would use in assessing the bids. Muldoon paid another consultant, Mark Saunders, for that information; Saunders obtained the information from George Stone, the SPAWAR official responsible for conducting the ATACC procurement. Pet. App. 5a.

When Litton was ready to submit its ATACC bid, McAusland and Muldoon agreed that Muldoon should not attempt to get copies of their competitors' technical proposals because to do so would be "playing with fire."[2] Pet. App. 5a. On August 21, 1987, Pafort

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[1] A Department of Defense regulation prohibits disclosure of the numerical weights for evaluation criteria. The regulation states that such weights "will not be disclosed either to offerors or to evaluators other than the [Source Selection Advisory Counsel], to preclude intentional or unintentional bias in proposals or evaluations." DoD Directive 4105.62(e)(3)(c) (Sept. 9, 1985), *reproduced at* C.A. App. 253 and *quoted at* Pet. App. 12a n.4. The relevant component of the Department of the Navy similarly had in place a directive prohibiting release of proposal evaluation weights. Department of the Navy, Naval Electronic Systems Command, NAVELEX INST. 4200.12C Change Transmittal No. 1 (Feb. 5, 1973), *reproduced at* C.A. App. 247.

[2] A FAR rule prohibited the disclosure of information in proposals outside the government: "After receipt of proposals, none of the information contained in them or concerning the number or identity of offerors shall be made available to the public or to anyone in the Government not having a legitimate interest." 48 C.F.R. 15.413-1(a) (1987). Another FAR rule prohibited "[t]echnical transfusion," *i.e.*, disclosure of "tech-

asked Muldoon when he would be able to obtain the "numbers" (competitors' bid figures). Wiretap Tr. No. 17. In late September 1987, Muldoon told Pafort he had asked his source to find out where Litton stood in comparison with the other bidders. Muldoon said that if he obtained that information, Pafort should come to Washington rather than discuss the information over the telephone. Pet. App. 6a. On September 29, Muldoon learned from Stone through Saunders the amount each competitor had bid, that Litton's bid was highest and that Litton's bid, most likely, would not be in the competitive range. Muldoon gave that information to McAusland, who agreed not to withdraw Litton's bid, because Litton was not supposed to know that it would be eliminated.[3] *Ibid.*

In February 1988, Pafort asked Muldoon for information on the ranking of the competitors. Muldoon had received that information from Saunders, who in

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nical information" from one competitor to another. 48 C.F.R. 15.610(d)(2) (1987).

[3] A FAR rule, 48 C.F.R. 15.610(d)(3) (1987), prohibited government officials from engaging in "[a]uction techniques," including "[a]dvising an offeror of its price standing relative to another offeror." The FAR rule on source selection, which covered rankings, ratings, and evaluation comments prepared by evaluation and advisory groups, 48 C.F.R. 15.612(d) (1987), required that agencies "exercise particular care to protect source selection information on a strict need-to-know basis," and prevent release absent "approval by the source selection authority." 48 C.F.R. 15.612(e) and (e)(1) (1987). Source selection authorities, in accordance with standard practice in competitive procurements, did not release information regarding rankings, ratings, or evaluations to other competitors. C.A. App. 359, 396, 433, 436.

turn had obtained it from Stone. In March 1988, SPAWAR officials informed Litton that it was eliminated from the competition. Pet. App. 7a.

b. *UYQ-21 procurement.* In June 1987, Litton and two competitors submitted bids to NAVSEA on the UYQ-21 contract. Petitioners spoke to Muldoon about the procurement on several occasions. On July 29, Muldoon told McAusland that he had copies of the government's evaluation of the price proposals. Pet. App. 7a. Two days later, Muldoon left a document for McAusland at Litton's Virginia office that contained information corresponding to the government's source selection plan for the UYQ-21 procurement. Muldoon had obtained the information from a member of the government's cost review team that was reviewing the proposals.[4] *Id.* at 7a-8a.

In August, Muldoon told petitioners that the Navy would likely award the contract without requesting BAFOs. Based on information obtained from the government official who was on the UYQ-21 cost review team, Muldoon also advised petitioners that Litton was second behind Raytheon in the bidding. Pet. App. 8a. Also during July and August, Muldoon told McAusland that he knew a government official who could ensure a request for BAFOs if Litton provided some money. After Muldoon advised McAusland that he could not obtain the technical evaluations before Litton would have to submit its

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[4] The confidentiality of the source selection plan was covered by 48 C.F.R. 15.612(c) and (e) (1987). See note 3, *supra*. Source selection plans were never to be released outside the government. C.A. App. 361, 430, 443.

BAFO, McAusland said he did not want to pursue that course of action. *Ibid.*

c. *FOCS procurement.* In December 1987, Muldoon provided a copy of the government's draft acquisition plan for the FOCS procurement to McAusland.[5] In early 1988, Pafort told Muldoon that Litton was interested in the program and asked Muldoon to check on a proposed date in the plan. Ultimately, Litton did not submit a bid. Pet. App. 9a.

2. The indictment charged petitioners with conspiring to defraud the United States by (1) depriving the Navy of the honest services of its employees and impairing and impeding government functions in competitive procurements, and (2) converting government property (procurement sensitive information) in violation of 18 U.S.C. 641 and engaging in wire fraud in violation of 18 U.S.C. 1343.[6] The

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[5] A SPAWAR regulation specifically prohibited release of the plan: "Because of the planning nature of acquisition plans, those which do not contain classified information shall be marked 'FOR OFFICIAL USE ONLY' in accordance with the guidelines of SECNAVINST 5570.2B. The content of an Acquisition Plan is privileged information and shall be prepared internally. Neither information contained therein nor copies thereof shall be released to contractors." Department of the Navy, Naval Electronic Systems Command, NAVELEX INST. 4200.6D (Jan. 29, 1982), *reproduced at* C.A. App. 251.

[6] 18 U.S.C. 641 makes it a crime when a person "embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof."

18 U.S.C. 1343 makes it a crime when a person, "having devised or intending to devise any scheme or artifice to

indictment also charged petitioners with the substantive offenses of violating Section 641 by converting procurement sensitive information in connection with the ATACC procurement, and violating Section 1343 by scheming to deprive the government of its exclusive use of such information. C.A. App. 17-38.

Before trial, the district court rejected claims that information was not a "thing of value" under Section 641 and that the provision was unduly vague. Pet. App. 20a-22a. After the jury found petitioners guilty, the court rejected petitioners' post-verdict motion for a judgment of acquittal. The court found that the jury had sufficient evidence to find that petitioners "sought and received procurement sensitive information from Mr. Muldoon, and that procurement sensitive information was not authorized to be released." *Id.* at 24a. The court also found that "[t]here was also evidence from which the jury could find that [petitioners] knew it was not authorized to be released." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-15a. Petitioners argued that 18 U.S.C. 641 does not bar the theft of government information unless published regulations clearly prohibit disclosure of the information. Relying on *United States* v. *Girard*, 601 F.2d 69 (2d Cir.), cert. denied, 444 U.S. 871 (1979), and *United States* v. *Morison*, 844 F.2d 1057 (4th Cir.),

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defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits * * * by means of wire * * * communication in interstate * * * commerce, any * * * sounds for the purpose of executing such scheme or artifice."

cert. denied, 488 U.S. 908 (1988), petitioners claimed that Section 641 mandates resort to statutes or regulations in order to give meaning to the prohibition against conveyance of government information "without authority." Absent such external standards barring disclosure, petitioners argued that Section 641 is unconstitutionally vague. Petitioners made the same argument with respect to their convictions under 18 U.S.C. 371 and 1343.[7] Pet. App. 9a-10a.

The court of appeals rejected petitioners' claims. It found that neither *Girard* nor *Morison* held that there must be published regulations specifically prohibiting the disclosure of information to support a prosecution under Section 641. Rather, the court stated that, in those cases, vagueness concerns were eliminated through the existence of published regulations prohibiting disclosure. Such regulations, the court concluded, are not "the exclusive method of preventing vagueness," and the absence of FARs covering all of the information converted by petitioners therefore did not immunize petitioners from prosecution under Section 641. Pet. App. 11a.

The court of appeals also rejected petitioners' contention that applying Section 641 to their conduct violates vagueness principles under the Due Process

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[7] Petitioners also argued that information should not be considered a "thing of value" under 18 U.S.C. 641. Pet. C.A. Br. 28 n.10. The court of appeals noted that it had previously held that information constitutes a "thing of value" under Section 641 in *United States* v. *Fowler*, 932 F.2d 306 (4th Cir. 1991). Pet. App. 9a n.2. Petitioners did not argue that information should not be considered "property" under 18 U.S.C. 371 or 1343. See Pet. C.A. Br. 30-32.

Clause. Pet. App. 12a. Examining the vagueness claim "in the light of the facts of the case at hand," *ibid.*, quoting *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975), the court found that the evidence established that the "disclosure was without authority and that [petitioners] knew as much." Pet. App. 12a. The court referred to (1) the published FARs that prohibited disclosure; (2) other Department of Defense regulations that prohibited disclosure; and (3) legends on many of the documents obtained by petitioners specifically restricting disclosure of those documents. *Id.* at 12a-13a.

The court of appeals further noted that petitioners' conduct indicated their awareness that the "disclosure was without authority." Pet. App. 13a. The court observed that McAusland had agreed that he should not withdraw Litton's ATACC bid, because he was not supposed to know where Litton stood in the competition. McAusland had also agreed with Muldoon that having Muldoon obtain competitors' bids would be "playing with fire." Similarly, Pafort agreed to meet with Muldoon in person to avoid discussing information over the telephone. And at trial Pafort conceded that it "was not the correct thing to do" to ask for the rankings and technical evaluations of competitors. *Ibid.* Finally, the court of appeals noted that the two government employees who had furnished the information testified that they were not authorized to make the disclosures, and other procurement officials testified that petitioners, given their experience and positions, would have known that the information was not subject to disclosure. *Ibid.* In view of those factors, the court concluded that the

statute was not vague as applied to petitioners' conduct. *Id.* at 13a-14a.[8]

ARGUMENT

1. Petitioners contend (Pet. 12-17) that government information is not a "thing of value" that can be converted under 18 U.S.C. 641 or "property" that can be obtained by fraud under 18 U.S.C. 1343. They further argue that the courts of appeals are divided on those issues. Petitioners' claims are incorrect and do not warrant this Court's review.

a. Section 641 punishes the knowing conversion of any "thing of value" of the United States. 18 U.S.C. 641. Section 1343 punishes any "scheme or artifice to defraud" executed through wire communications. 18 U.S.C. 1343. Improperly obtaining government information with respect to internal methods, deliberations, and determinations in a competitive procurement falls within the scope of those prohibitions.

In *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987), this Court held that the misappropriation of confidential business information violates "property" rights protected by the mail and wire fraud statutes, 18 U.S.C. 1341 and 1343. The Court observed that "[c]onfidential business information has long been recognized as property." 484 U.S. at 26, citing, *inter alia*, *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U.S. 236, 250-251 (1905). Under *Carpenter*, a

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[8] The court of appeals also rejected petitioners' claims based on the jury instructions, allegedly prejudicial publicity, and the admission of evidence of the procurement officials' guilty pleas. Pet. App. 14a-15a. They do not renew those arguments here.

fraudulent scheme to obtain confidential government procurement information is covered by Section 1343. See *United States* v. *Perholtz*, 842 F.2d 343, 367 (D.C. Cir.) ("appropriating the confidential information concerning the [procurement] specifications and then leaking it to [a bidder] * * * skewed the bidding process and directly impinged upon the government's economic interests"), cert. denied, 488 U.S. 821 (1988).[9]

The same principle applies to Section 641. The phrase "thing of value" in Section 641 readily encompasses intangible property, such as confidential information. That construction accords with the statute's purpose to provide comprehensive protection to the government's property rights. As this Court has noted, "[t]he history of § 641 demonstrates that it was to apply to acts which constituted larceny or

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[9] Petitioners argue (Pet. 17 n.19) that *Carpenter* protects only private business information and that its holding is inapplicable to "government information, which is presumptively non-secret." There is no presumption of nonsecrecy about government procurement information, however, when the government enters the private market to purchase goods or services. In that context, the government acts in a proprietary capacity and has just as much interest in ensuring the integrity and confidentiality of its competitive bidding procedures as any private entity. Nor is the government's interest in protecting the confidentiality of information limited to the procurement context. See, *e.g.*, *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146 (1989) (information compiled for law enforcement purposes); *United States* v. *Reynolds*, 345 U.S. 1, 7-8 (1953) (military and state secrets). We note that petitioners did not claim in the court of appeals that Section 1343 is inapplicable to government information. See note 7, *supra*.

embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions." *Morissette* v. *United States*, 342 U.S. 246, 269 n.28 (1952); see also *Bell* v. *United States*, 462 U.S. 356, 360 (1983) (the phrase "thing of value" in 18 U.S.C. 2113(b) encompasses intangible property and "is thus broader than common law larceny").[10] Section 641's application to information is therefore clear; there is no ambiguity (Pet. 15) calling for application of the rule of lenity. *Moskal* v. *United States*, 111 S. Ct. 461, 465 (1990) (refusing "to deem a statute 'ambiguous' for purposes of lenity merely because it [is] *possible* to articulate a construction more narrow than that urged by the Government").[11]

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[10] Petitioners err in relying (Pet. 14-15) on *Dowling* v. *United States*, 473 U.S. 207 (1985). That case held that the interstate transportation of records containing copyright-infringing performances did not constitute interstate transportation of "goods, wares, [or] merchandise" with knowledge that they were stolen or converted, in violation of 18 U.S.C. 2314. That holding responded to Section 2314's specific language, its narrow focus on the protection of physical goods, and concerns to avoid undermining Congress's scheme for protecting copyrights. 473 U.S. at 214-227. None of those considerations applies here.

[11] Petitioners argue that if Section 641 is construed to bar the misappropriation of confidential government information, it would give rise to difficult First Amendment questions. Pet. 15. There is, however, no First Amendment issue raised by punishing those who appropriate confidential procurement information in order to subvert the government's competitive bidding process. And, because "Section 641 applies only to those conveyances of government property made 'without authority' * * * many officials may routinely pass on

b. The courts of appeals have repeatedly upheld convictions under Section 641 for the wrongful acquisition of government information. See *United States* v. *Fowler*, 932 F.2d 306, 309-310 (4th Cir. 1991) (upholding Section 641 conviction of a defendant who misused information obtained from copies of classified documents; court rejected the argument that information in a document is not a "thing of value" under Section 641); *United States* v. *Barger*, 931 F.2d 359, 368-369 (6th Cir. 1991) (upholding Section 641 conviction of a defendant who obtained a DEA manual relating to a rival motorcycle gang; "[c]learly, the value of the * * * manual is in the information contained therein" and that is "enough to meet the property or 'thing of value' element of the statute"); *United States* v. *Jeter*, 775 F.2d 670, 679-682 (6th Cir. 1985) (upholding Section 641 conviction of defendant who illegally obtained and distributed carbon copies of secret grand jury documents and proceedings; court noted that "Congress' very use of the more expansive 'thing of value' rather than 'property' strongly implies coverage beyond mere tangible entities"), cert. denied, 475 U.S. 1142 (1986); *United States* v. *Girard*, 601 F.2d 69, 70-71 (2d Cir.) (upholding conviction of a former DEA agent who obtained and distributed confidential law enforcement records;

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government information without running afoul of the statute." *United States* v. *Jeter*, 775 F.2d 670, 681 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986). As the Second Circuit has stated, "[i]n view of the statute's plainly legitimate sweep," any First Amendment issues at the margins can "be cured on a case by case basis." *United States* v. *Girard*, 601 F.2d 69, 72, cert. denied, 444 U.S. 871 (1979).

"[a]lthough the content of a writing is intangible, it is nonetheless a thing of value"), cert. denied, 444 U.S. 871 (1979).[12]

Petitioners argue (Pet. 12-13) that the Ninth Circuit has rejected the application of Section 641 to government information. The cases cited by petitioners, however, did not require the Ninth Circuit to consider whether Section 641 covers the conversion of government information. In *Chappell* v. *United States*, 270 F.2d 274 (9th Cir. 1959), an Air Force sergeant was prosecuted for converting to his own use the services and labor of an airman who was ordered to paint private apartments that the sergeant owned. Based on its analysis of the common law tort of conversion, the court of appeals concluded that the airman's "services and labor" were not a "thing of value" under Section 641. 270 F.2d at 276-278. In *United States* v. *Tobias*, 836 F.2d 449, 451 (9th Cir.), cert. denied, 485 U.S. 991 (1988), the court indicated that Section 641 does not apply to "intangible goods" such as "classified information." That statement, however, was dictum, because the court held that the cryptographic cards that the defendant had converted

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[12] See also *United States* v. *May*, 625 F.2d 186, 191-192 (8th Cir. 1980) (intangible property is covered by Section 641; holding that evidence of salaries of personnel involved in unauthorized flights on government aircraft was properly admitted); cf. *United States* v. *DiGilio*, 538 F.2d 972, 976-978 (3d Cir. 1976) (affirming Section 641 conviction of defendant who obtained confidential information and documents from FBI files, because the copies were made with government resources, equipment, and supplies; reserving question whether information alone is protected by Section 641), cert. denied, 429 U.S. 1038 (1977).

in that case constituted "tangible property." 836 F.2d at 452. Accordingly, *Chappell* and *Tobias* did not deal with claimed appropriations of government information and do not conflict with the court of appeals' decision in this case.[13]

Nor is there a conflict concerning the application of the wire fraud statute to schemes to obtain government information. The only circuit that has addressed the issue squarely has held that such schemes violate the counterpart mail fraud statute. *United States* v. *Perholtz*, 842 F.2d at 367.[14]

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[13] Moreover, despite the statement in *Tobias* that the Ninth Circuit recognizes an " 'intangible goods' or 'classified information' " exception to Section 641, 836 F.2d at 451, the Ninth Circuit has never applied such an exception to government information, and it has affirmed a conviction under Section 641 for converting the "information contained" in grand jury transcripts. *United States* v. *Friedman*, 445 F.2d 1076, 1087, cert. denied, 404 U.S. 958 (1971). A different panel of that court has also noted that the continued validity of *Chappell*'s narrow construction of Section 641 has been "seriously undermined." *United States* v. *Schwartz*, 785 F.2d 673, 681 n.4, cert. denied, 479 U.S. 890 (1986). *Tobias*'s expression (836 F.2d at 451 n.2) of disagreement with *Schwartz* indicates that the issue may well warrant further consideration by the Ninth Circuit in a case that squarely presents the issue; it does not suggest that there is a circuit conflict ripe for this Court's review.

[14] The mail fraud cases cited by petitioners (Pet. 17 n.19) have no relevance to this case. Those cases applied the rule of *McNally* v. *United States*, 483 U.S. 350 (1987), that the mail fraud statute does not cover schemes to deprive governments or employers of "intangible rights," such as the right to loyal service or the right to receive accurate information. None of those cases involved a private party's fraudulent acquisition of government procurement information. See *United States* v.

2. Petitioners further contend (Pet. 18-24) that, even if government information constitutes "property," the unauthorized acquisition of such information violates the theft and wire fraud statutes only when disclosure of the information is specifically prohibited by a statute or a published regulation. That contention lacks merit.

a. Section 641 does not require the existence of a published regulation prohibiting disclosure in order to render the converted use of government information unlawful, or the conveyance of the information to be "without authority," 18 U.S.C. 641. There is no legal requirement that the conversion of personal property be prohibited by statute or published regulation to come with Section 641, and there is no basis for creating a different rule for informational property. The issue is whether the release and conversion of the information in question was unauthorized; here, the evidence was sufficient to establish that the procurement information at issue was not to be released to persons such as petitioners.[15]

Kato, 878 F.2d 267, 269 (9th Cir. 1989) ("government's right to accurate information [from an applicant for a pilot's license] constitutes an intangible right"); *United States* v. *Slay*, 858 F.2d 1310, 1316 (8th Cir. 1988) ("[w]ithholding valuable information from the City is not the same thing as depriving the City of its property"); *United States* v. *Conover*, 845 F.2d 266, 271 (11th Cir. 1988) (no showing that employee who breached his fiduciary duty "maintained confidential business information").

[15] The jury was properly instructed on that issue. With respect to Section 641, the jury was instructed that conversion includes the use of someone else's property in an unauthorized

First, both published and unpublished government regulations specifically prohibited Navy officials from releasing the procurement-sensitive information that petitioners surreptitiously acquired. The FARs, which are published, covered nondisclosure of (1) the contents of competitors' proposals; (2) the evaluators' rankings, scores, and comments; and (3) the UYQ-21 Source Selection Plan. Internal Navy directives prohibited release of the ATACC weights and the FOCS acquisition plan.[16] Gov't C.A. Br. 31 n.18; see notes 1, 2, 3, 4, and 5, *supra*. Moreover, government procurement officials testified to an unbroken practice against release of such information.[17] C.A. App. 359, 361-363, 396, 430, 433, 436, 443-446.

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manner, and "it would be a misuse of procurement sensitive information if confidential procurement information was released and if the defendant knowingly and willfully sought release of the information while knowing that such release was not authorized." C.A. App. 188. The jury was also instructed that to convey information " 'without authority' means that the conveyance was made to someone other than an authorized person and was made without the permission and consent of a Government official who is actually authorized to give that permission." *Id.* at 188-189.

[16] Those formal written directives, although not published, were available to the public. See C.A. App. 584-585. Petitioners suggest (Pet. 19, 21) that, absent published regulations, officials would have the power to impose arbitrary and abusive restrictions on the release of government information. The existence of written nondisclosure regulations, whether or not published, removes concerns about arbitrary enforcement.

[17] The courts below properly allowed government officials to testify that they did not release to bidders the procurement-sensitive information that petitioners obtained. A comprehensive system for protecting confidential information is likely to

The evidence also indicated that marketing executives with the level of experience possessed by petitioners would have known of those prohibitions. Many of the documents contained legends restricting disclosure, and petitioners' own conduct attests to their knowledge that they were seeking information that was not authorized to be released. Petitioners did not directly ask the government for information about the relative standing of bidders in their competitive procurements or about the government's internal selection process; rather, they had Litton pay a consultant, Muldoon, to use indirect means to obtain that information. Later, when Muldoon provided information about Litton's poor prospects in the ATACC procurement, McAusland did not withdraw Litton's bid, because he knew that Litton was not supposed to know that information and withdrawing the bid might reveal that Litton had obtained information it was not authorized to have. McAusland later stated that getting his competitors' bids would be "playing with fire." Similarly, Pafort arranged a personal meeting with Muldoon to avoid discussing information by phone, and he acknowledged at trial that asking for competitors' rankings and technical evaluations would be incorrect. Pet. App. 13a.

Petitioners suggest (Pet. 21, 23 n.28) that the absence of published regulations subjected them to "an intolerable risk of unfair surprise." The jury was

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leave at least some room for discretionary exceptions; the testimony here simply established that, to the extent there was residual discretion to release the information, government officials had a consistent practice not to do so with respect to the information obtained by petitioners.

required to find, however, that petitioners specifically intended to obtain information whose release was unauthorized and that petitioners knew they were doing so. The jury was instructed that, in order to convict, it had to find that (1) petitioners acted knowingly and with "the specific intent to do something the law forbids, that is to say, with bad purpose, either to disobey or to disregard the law," C.A. App. 183; (2) petitioners "knew that the release of the material they sought was unauthorized," C.A. App. 185; and (3) petitioners "knowingly and willfully sought release of the information while knowing that such release was not authorized," C.A. App. 188. These requirements "relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws* v. *United States*, 325 U.S. 91, 102 (1945); *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 342 (1952); *United States* v. *Ragen*, 314 U.S. 513, 524 (1942); *Gorin* v. *United States*, 312 U.S. 19, 26-28 (1941).[18]

b. Petitioners contend (Pet. 19-20 & n.23) that the court of appeals' decision conflicts with *United States* v. *Girard*, *supra*. That claim is unfounded. In *Girard*, a DEA agent and a former DEA agent were convicted under Section 641 for selling information

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[18] Petitioners argue in passing (Pet. 23-24) that a published-regulation requirement should exist for Section 1343. In *Carpenter* v. *United States*, however, the Court indicated that private business information is protected "property" without regard to written rules; "the declaration to that effect in the employee manual merely removed any doubts on that score and made the finding of specific intent to defraud that much easier." 484 U.S. at 28. The same principle applies to schemes to appropriate confidential government information.

from DEA computer files to a third party. In rejecting the defendants' vagueness challenge to Section 641, the court of appeals stated that the defendants "must have known that the sale of DEA confidential law enforcement records was prohibited." 601 F.2d at 71. The court added that "[t]he DEA's own rules and regulations forbidding such disclosure may be considered as both a delimitation and a clarification of the conduct proscribed by the statute." *Ibid.* The relevant "rules and regulations," which were described in the district court's opinion, consisted of published regulations of the Justice Department and an unpublished DEA Agents' Manual that "further particularizes when a disclosure of information is improper." *United States* v. *Lambert*, 446 F. Supp. 890, 900 (D. Conn. 1978).[19] *Girard* therefore does not impose a publication requirement; it holds only that the defendants must have adequate notice that disclosure is forbidden, whatever the source of that notice.[20]

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[19] The *Lambert* court also stated that, to alleviate vagueness concerns, Section 641 should be interpreted to bar "only transfers of information affirmatively prohibited by other federal statutes, administrative rules and regulations, *or, perhaps, longstanding government practices.*" 446 F. Supp. at 899 (emphasis added). Nothing in the Second Circuit's opinion rejects that approach; rather, the court of appeals affirmed on the facts before it and characterized the district court's opinion as "well-reasoned." 601 F.2d at 70.

[20] That is the way the decision has been read in the Second Circuit. See *United States* v. *Jones*, 677 F. Supp. 238, 241 (S.D.N.Y. 1988) (visitor to prosecutor's office could be charged under Section 641 for attempting to sell information he overhead about an ongoing criminal investigation; "[g]iven the

Nor does the decision below conflict with the Sixth Circuit's ruling in *United States* v. *Jeter*, *supra*. The passage in the *Jeter* opinion cited by petitioners (Pet. 20) simply "follow[ed] the lead of *Girard* in deeming the instant application of Section 641 inappropriate for First Amendment overbreadth (or Fifth Amendment vagueness) scrutiny." 775 F.2d at 682. The court of appeals made no mention of petitioners' contention that a rule of nondisclosure must be based on published regulations. More recently, in *United States* v. *Barger*, 931 F.2d at 368-369, the Sixth Circuit upheld a conviction for a private party's wrongful acquisition of a DEA manual containing information about an ongoing investigation, relying explicitly on the agency's practice (not a published rule) to restrict disclosure of the manual.[21]

In any event, even if the circuits were in conflict on the issue presented by petitioners, the conflict would not warrant this Court's review, because the application of Section 641 to conduct of the sort

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government's *long standing practice* of maintaining the confidentiality of information relevant to on-going criminal investigations, * * * the defendant could reasonably know the proscribed nature of his alleged actions") (emphasis added).

[21] In rejecting the claim that the government had failed to prove that the defendant's possession was "without authority," the court of appeals in *Barger* cited the defendant's admission that he was not supposed to have the DEA manual; the DEA's practice to distribute the manual only to law enforcement personnel with "a special need to know"; and the legend in the manual stating that "only certain people with certain needs are authorized to possess it." *United States* v. *Barger*, 931 F.2d at 368-369. Petitioners' implication (Pet. 20 n.24) that the court relied on a published regulation is incorrect.

involved in this case is not of continuing importance. In 1988, Congress enacted the Office of Federal Procurement Policy Act Amendments, Pub. L. No. 100-679, § 6, 102 Stat. 4063 (Procurement Integrity Act), codified at 41 U.S.C. 423 (Supp. II 1990). That Act specifically prohibits employees of a company involved in a federal agency procurement application from obtaining "directly or indirectly, from any officer or employee of such agency any proprietary or source selection information" regarding a procurement. 41 U.S.C. 423(j)(1) (Supp. II 1990). Section 423(p)(6) defines "proprietary information" to include both "information contained in a bid or proposal" and "cost or pricing data." Section 423(p)(7) defines "source selection information" as, *inter alia*, "information determined by the head of the agency or the contracting officer to be information * * * the disclosure of which to a competing contractor would jeopardize the integrity or successful completion of the procurement concerned" and that is required to be kept secure in order to prevent disclosure.[22]

Because the Procurement Integrity Act specifically prohibits employees of bidders (like petitioners) from obtaining information about their competitors' bids and the government's internal procurement

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[22] Petitioners refer (Pet. 27 & n.38) to congressional statements indicating that some legislators believed that the Procurement Integrity Act filled a gap in existing law. Those statements are not probative of the scope of laws, such as Section 641, enacted by prior Congresses. See *Fort Stewart Schools* v. *FLRA*, 495 U.S. 641, 650 (1990) ("There is no conceivable persuasive effect in legislative history that may reflect nothing more than the speakers' incomplete understanding of the world upon which the statute will operate.").

processes, future prosecutions similar to this case can be brought under the Procurement Integrity Act. The availability of that Act diminishes the significance of the question whether the same conduct would independently violate Section 641. Accordingly, there is no need for the Court to consider the issues raised by petitioners concerning the application of Section 641 to the information that they obtained.[23]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[23] Petitioners suggest (Pet. 25-30) that the Court should grant review because of the possible chilling effect on information-gathering efforts by journalists and others. The prospect that Section 641 might chill legitimate efforts to obtain information from the government is remote and speculative. Petitioners cite no instance in which Section 641 has been applied to such a case, and, in light of the stringent knowledge and willfulness requirements applicable to Section 641, it is difficult to imagine how the provision could be a trap for the innocent. The procurement fraud involved in this case raises no such far-reaching concerns. Cf. *United States* v. *Jeter*, 775 F.2d at 682 (reserving issue of "the constitutionality of Section 641 in a 'Pentagon Papers' kind of situation").